

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6211

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6211

FRED CHERRY,

Plaintiff-Appellant

v.

THE POSTMASTER GENERAL OF THE UNITED STATES,

Defendant-Appellee

On Appeal From The United States
District Court for The Eastern District
of New York

APPELLANT'S BRIEF

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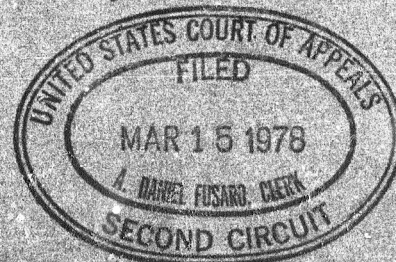


TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Preliminary Statement	Cover Page
Issues Presented For Review	1
Statutes Involved	2
Statement of the Case	3
Proceedings Below	8
ARGUMENT	
I. The Case is Justiciable	14
Standing	16
Ripeness	18
Mootness	18
II. The Court Below Used Improper Procedure In Arriving at the Factual Conclusion That Plaintiff's Case Was Moot	25
CONCLUSION	28

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
Baker v. Carr, 369 U.S. 186 (1972)	18
Blackhawk Heating v. Driver, 433 F.2d 1137 (1970)	25, 26
Carroll v. Commissioners, 393 U.S. 175 (1968)	20
Cherry v. Postmaster General, 332 F.Supp. 785 (S.D. N.Y. 1971) <u>aff'd</u> 460 F.2d 1063 (2d Cir. 1972)	passim
Cherry v. Postmaster General, 272 F.Supp 982 (DPR 1967) <u>aff'd without opinion</u> by First Cir., <u>cert den.</u> 391 U.S. 914, 88 S.Ct. 1089, 20 L.Ed.2d 653 (1968)	5, 6
Cohen v. California, 403 U.S. 15 (1971)	14
Conley v. Gibson, 355 U.S. 41 (1957)	25
Dunn v. Blumstein, 405 U.S. 330, 333 n.2	21
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	14
Gooding v. Wilson, 405 U.S. 518 (1972)	14
Lamont v. Postmaster General, 381 U.S. 301 (1965)	17
Long v. District of Columbia, 469 F.2d 927, 931 (D.C. Cir. 1972)	15
Milwaukee Social Democratic Pub. Co. v. Burleson, 355 U.S. 407 (1921)	14
Moore v. Ogilvie, 394 U.S. 814 (1969)	20, 21
New York Times v. Sullivan, 376 U.S. 254 (1964)	14
Richardson v. Ramirez, 418 U.S. 24, 34-40 (1974)	19
Richardson v. United States, 418 U.S. 166 (1974)	17
Roe v. Wade, 410 U.S. 113, 125 (1972)	21

<u>Case</u>	<u>Page</u>
Street v. New York, 394 U.S. 576 (1969)	14
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)	20
Tatum v. Laird, 408 U.S. 1 (1972)	25
Tollet v. United States, 485 F.2d 107 (8th Cir. 1973)	14, 22
United States v. Handler, 383 F.Supp 1267 (D. Md. 1974)	14, 22
United States v. W. T. Grant Co., 345 U.S. 629 (1953)	6, 7, 19
Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)	19
Warth v. Seldin, 422 U.S. 490 (1975)	17
 <u>Statutes and Regulations</u>	
18 U.S.C. Sec. 1718	passim
28 U.S.C. Sec. 2282 (repealed)	3
28 U.S.C. Sec. 2284	27
39 U.S.C. Sec. 3001	2, 4, 5, 8
 Federal Rules of Civil Procedure	
Rule 12(b)	passim
Rule 59(e)	13
 Postal Service Manual	
Sec. 131.222	10
Sec. 161.32	10
Postal Services Confidential Field Manual Sec. 123.44f	11, 13, 22

Miscellaneous

Page

Dorsen, Bender & Neuborne,
1 Political and Civil Rights in
the United States (4th Ed. 1976)

16, 17

Wright, Miller & Cooper,
Federal Practise and Procedure

18, 24

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The decision appealed from was rendered by
the Hon. Mark A. Constantino. There was no opinion.

ISSUES PRESENTED
FOR REVIEW

1. Whether the district court erroneously concluded that plaintiff's complaint, alleging the unconstitutionality on First Amendment grounds of 18 U.S.C. Sec.1718, did not present a justiciable case or controversy.

2. Whether the district court, in considering matters outside the pleading, erroneously granted defendant's Rule 12(b)(6) motion, rather than treating it as a motion for summary judgment, as required by Rule 12(b).

STATUTES INVOLVED

18 U.S.C. Sec. 1718 provides:

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is non-mailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

39 U.S.C. Sec. 3001, provides in pertinent part:

(a) Matter the deposit of which in the mails is punishable under sections 1302, 1341, 1342, 1461, 1463, 1714, 1715, 1716, 1717 or 1718 of title 18, or section 26 of the Animal Welfare Act is nonmailable.

(b) Except as provided in subsection (c) of this section, nonmailable matter which reaches the office of delivery, or which may be seized or detained for violation of law, shall be disposed of as the Postal Service shall direct.

STATEMENT OF THE CASE

This is an action to declare 18 U.S.C. Sec. 1718 unconstitutional. ^{1/} Plaintiff's application for a statutory three-judge court was denied, and his complaint dismissed, by Constantino, J., "for lack of a justiciable case or controversy." (A. 61)^{2/} There is no opinion.

Plaintiff's complaint alleged that he is engaged in disseminating news and editorial comment on matters of general political, religious and sociological significance, and that, in furtherance of that activity, he had been attempting to mail post cards which contained a lengthy attack against homosexuality, and against a bill introduced into the New York City Council which would have prohibited discrimination against individuals based upon their sexual preference (para. 4; A. 4). A copy of the full message, which was annexed to the complaint, is set out in the Appendix (A. 10). The complaint also alleges that the plaintiff "intends to attempt to mail more copies" of the particular postcard attached to the complaint, as well as

^{1/} Plaintiffs complaint was filed on August 12, 1976, the last day entitling plaintiff to the three-judge court provided by the now-repealed 28 U.S.C. Sec. 2282. See Sec. 7, P.L. 94-381.

^{2/} "A" refers to the Appendix to the Briefs.

others on the same subject in the future (para. 6; A. 5). The complaint alleges that Postal Service employees "have repeatedly seized and withheld from delivery" the post cards attacking homosexuality, "have repeatedly refused to accept other copies of said cards for mailing, and have repeatedly returned other copies of said cards" to the plaintiff (para. 7(d); A. 5). The complaint alleges that the basis for the interference with plaintiff's free use of the mails is the existence of 18 U.S.C. Sec. 1718 and 39 U.S.C. Sec. 3001, and it prays that a three-judge court be convened to declare those statutes unconstitutional and to enjoin their enforcement.

A complete description of this case must begin with a predecessor case, Cherry v. Postmaster General, 332 F.Supp. 785 (S.D. N.Y. 1971), affirmed, 460 F.2d 1063 (2nd Cir. 1972) (Cherry I), which is referred to in plaintiff's complaint and is an integral part of the present suit.

Cherry I, like the case at bar, was a suit by the plaintiff attacking the constitutionality of Secs. 1718 and 3001. The facts of that case, taken verbatim from the district court opinion (332 F.Supp. at 787-88), are as follows:

Cherry first entered into combat with the Postmaster General in 1966 when he attempted to disseminate through the mails post cards which admittedly defamed a certain clergyman as a homosexual. The Postmaster General declared these post cards to be non-mailable under 18 U.S.C.

Sec. 1718 and 39 U.S.C. Sec. 3001. Cherry contested the actions by the Postmaster General in a lawsuit which sought to convene a three-judge court to enjoin the enforcement of Secs. 1718 and 3001 and to declare the sections unconstitutional. Plaintiff lost all the way to the Supreme Court. See Cherry v. Postmaster General, 272 F. Supp. 982 (D.P.R. 1967), aff'd without opinion by the First Circuit, cert. den. 391 U.S. 914, 88 S.Ct. 1809, 20 L.Ed.2d 653 (1968).

After that loss plaintiff Cherry continued his assault on homosexuality via the medium of the post card by mailing and continuing to mail post cards which are entitled "Homosexual Child-Molesters to Become School Teachers." In or about July 1971 the Post Office returned one of the post cards. Cherry went to the Brooklyn General Post Office on July 23, 1971 and inquired about the reasons for the return of the post card. The Government contends that Cherry was told at that time that the reverse side of the post card contained the endorsement "Return Requested" which had become obsolete for first class post cards such as his. Cherry contends that he was told by Post Office officials that the post card was returned by error. Which ever story is true makes no difference in this decision. In any event, Cherry was dissatisfied with these explanations by three different postal officials.

Three days later Cherry went back to the Brooklyn General Post Office and presented one of these post cards for mailing. The matter was referred to Martin Shapiro, the Postmaster of the Brooklyn General Post Office. Shapiro, who apparently remembered Cherry's earlier conflict with the Post Office, was under the impression that a 1966 order required the Postmaster of each City to withhold post cards mailed by Cherry. Shapiro that same day sent a letter to the Judicial Officer of the United States Postal Service in Washington, D.C. in which he sought advice as to the mailability of Cherry's post card.

On July 28, 1971 the Judicial Officer wrote to Mr. Shapiro that he was wrong about the 1966

order which was limited only to the defamatory post cards which were the subject of Cherry's earlier action. He stated in the letter that Mr. Shapiro had no authority to withhold the post card at issue in the instant case.

On July 30, 1971 Mr. Shapiro received that letter from the Judicial Officer. Cherry's post card was released and mailed to the addressee. No post cards containing the material under the title "Homosexual Child-Molesters to Become School Teachers" subsequently mailed by Cherry have been detained or withheld by any Post Office. Cherry and Charmatz then brought this lawsuit.

In the course of the district court proceedings in Cherry I, the government made several concessions: that Mr. Shapiro had "no authority to withhold the postcard", that "there is no Postal Order, Regulation or Statute prohibiting plaintiff from doing so or empowering the Postmaster to withhold such post cards;" and that "There is no likelihood of official interference with plaintiff Cherry's education campaign (against homosexuals by post card)." The government made the same concessions with respect to plaintiff's proposed post cards concerning Mayor Lindsay's attitudes towards homosexuals (Id. at 788-89).

On the basis of those concessions, Judge Gurfein dismissed plaintiff's complaint as moot. Relying on United States v. W.T. Grant Co., 345 U.S. 629 (1953), he held that, though the burden of showing mootness is "a heavy one," a case will be declared moot "if the defendant can demonstrate that 'there is no reasonable expectation that the

wrong will be repeated.'" (Id. at 789). This Court affirmed.

Thereafter, plaintiff filed the complaint in this suit in August 1976. As noted above, it alleged that, notwithstanding the government's 1971 concessions in Cherry I, his postcards challenging homosexuality had been interfered with by the Postal Service in 1974, 1975 and 1976 in Brooklyn, New York City and San Juan (para. 7(d); A. 5).

In answering the complaint, the defendant admitted that plaintiff "did attempt to mail one post card from the General Post Office, Brooklyn, N.Y. in 1974; one post card from the Church Street Post Office, New York, New York in 1975 and two post cards from the Old San Juan Post Office, San Juan, Puerto Rico, one in 1975 and one in 1976;..." (para. FIFTH; A. 12). The defendant also admitted "that on no more than four isolated instances during the past three years (1974-1976), certain post cards of plaintiff Cherry have been returned to him by the United States Postal Service for various reason" (para. ELEVENTH: A.13-14. ^{3/}

The defendant's Fifth Affirmative Defense alleges that plaintiff's claims are moot by reason of the fact that the defendant does not deny the mailability under Title 18, United States Code, Section 1718, of any post cards of plaintiffs,

^{3/} The paragraph adds: "Plaintiff Cherry's own conduct and representations were the cause of the return of the said post cards." The plaintiff disputes that allegation. See note 7, infra.

otherwise mailable, which contains the material appearing in Exhibit "A" of plaintiff's complaint herein (A. 16).

Proceedings Below

After some modest discovery by the plaintiff, he moved to convene a three-judge court, attaching to the motion his affidavit with exhibits which sketched out his version of the facts relating to the 1974-76 interference with his mail. Thereafter, the defendant cross-moved to dismiss "pursuant to Rule 12(b) of the Federal Rules of Civil Procedure," (A. 43) attaching to the cross-motion eight affidavits by various Postal Service employees which described the defendant's position concerning the 1974-76 interference with plaintiff's mail (A.44-53).

The defendant's accompanying memorandum of law (p. 10), conceded that "the plaintiff has the right to mail" the post cards in issue in this case (entitled "N.Y. City Councilmen sell out to Homosexual Child-Molesters"), and "that the post office has no authority to withhold them." In addition, the government admitted in its memorandum (pp. 10-11) "that on two separate occasions, one in Brooklyn in 1974 and the other in Manhattan in 1975, low ranking employees wrongfully refused to accept and/or deliver the cards in issue on the ground they were nonmailable" under Sec. 1718 and Sec. 3001.^{4/}

^{4/} See Defendant's Responses to Plaintiff's Interrogatories dated December 22, 1976, Responses no. 2 and No. 3 (A.17-18).

The defendant's answer, paragraphs FIFTH and ELEVENTH, admits that four such post cards, including the ones mailed in Brooklyn and Manhattan, were returned to the plaintiff. The defendant, in his Responses to Plaintiff's Interrogatories dated December 22, 1976, refers to six cards which were returned, four in Puerto Rico, and the two from Brooklyn and Manhattan (A.18). As to the four cards mailed in Puerto Rico which were returned to the plaintiff, the defendant claims they were returned "in good faith but erroneously" because the postal clerks involved did not realize that post cards could be sent as registered mail, as demanded by the plaintiff (A.18).

The plaintiff has a different version of the reason why the four Puerto Rican post cards were returned. ^{5/} He states that in March 1975, he was told in Puerto Rico that post cards could not be sent as registered mail (Para. 6; A. 25). However, he shortly afterwards received a letter from the Postal Service's Consumer Advocate advising him that post cards could be registered (para. 7; A. 25). That letter is attached to his affidavit (A. 30). Plaintiff returned to the San Juan Post Office on May 1 and May 5, 1975 and offered his

^{5/} All of the following statements of fact come from plaintiff's July 13, 1977 affidavit filed in support of his Motion to Convene a Three Judge Court (A.24-29).

post card for mailing by registered mail. On May 1, he showed the clerk the Consumer Advocate's letter. Nonetheless, after conferring with other postal officials, the cards were refused for mailing (para. 8; A. 25). On May 5, four of the cards were accepted as registered mail, but were returned to plaintiff with a letter from Mr. William Rivera, Acting Manager, stating that "According to Sections 131.222 and 161.32 of the Postal Manual," the cards "are unmailable" (A. 31). Those are the cards which the defendant admits were returned "erroneously." See Affidavit of William Rivera, attached to Defendant's Cross-Motion to Dismiss, which states that the basis for rejecting the four letters was Mr. Rivera's belief that post cards could not be registered (A. 25).^{6/} Rivera claims he refused to accept the post cards for mailing from the plaintiff (para 5; A. 48); plaintiff claims that Mr. Rivera first told him the cards were "nonmailable," but accepted them when plaintiff pointed out that "only the Postal Inspection Service may make determinations of nonmailability, when questions of 'written, printed or graphic matter' are involved." (para. 9; A. 26). Thus, plaintiff's position about those four cards is that they were refused initially because of their content, and subsequently returned to him

^{6/} Paragraph 3 of the Rivera affidavit states that the events occurred March 9, 1975. That is an error, as indicated by the May 9, 1975 date on the accompanying letter (A. 49).

on the pretext that they could not be registered (para. 11; A. 26). Indeed, the plaintiff claims (para. 12; A. 27) that on the day after he received the post cards which were returned to him by Mr. Rivera, a Postal Inspector named Wilson told him that the cards actually were returned because they violated Sec. 123.44f of the Postal Service Manual, which prohibits the mailing of material in violation of 18 U.S.C. Sec. 1718. The plaintiff says that Mr. Wilson gave him a copy of the page from the Postal Service Manual containing Sec. 123.44f, which is attached as Exhibit C to plaintiff's affidavit (A.32).

On March 3, 1976, plaintiff asserts, he again attempted to mail one of his post cards by registered mail at the San Juan post office. He claims that the postal clerk, Mr. Carceras, said he would have to confer with other officials, and that when he returned fifteen minutes later, told plaintiff that "the wording on the post card was the reason it was refused for mailing" (paras. 18-19; A.28). In an affidavit submitted in this case, however, Mr. Carceras states that he refused to accept the post card because plaintiff wanted to register it, but that he understood that registered mail had to be sealed and thus could not accept the post card (A. 52). In a companion affidavit by Neil C. Kamichoff, whom Mr. Carceras consulted, Kamichoff admits that "the clerk indicated that the postal card bore scurrilous and defamatory inscriptions against several Postal Inspectors," but he asserts

that he advised Carceras that the card could not be registered because it was not sealed (A. 53).

The plaintiff also alleges in his affidavit that he mailed a thousand copies of his post card in the summer of 1974, and that he knows some were not received by acquaintances to whom they were addressed (paras. 1-2; A. 24). As a result he sent six of the post cards as registered mail (evidently without difficulty), he received return receipts for only five of them, and, after six weeks of inquiry, the sixth card was returned to him without explanation rather than being delivered to the addressee (para. 4; A. 24).

Plaintiff's affidavit also asserts that in February 1975, he mailed two of his post cards by ordinary mail in Puerto Rico to two acquaintances, residents of Puerto Rico, and that neither one was received (para. 5; A. 25). The implication is that those non-deliveries was the reason for his attempts to mail the cards as registered mail in the following months of the San Juan Post Office.

In the face of these conflicting claims, the court below granted the government's motion to dismiss the complaint "for lack of a justiciable case or controversy." The court also ordered "that the defendant shall permit plaintiff to mail the post cards in issue herein and shall not seize, detain, impound, forfeit, destroy or in any other manner impede their deliver." The court's order also found that

there were only two instances since Cherry I where plaintiff was "mistakenly prevented from mailing the post cards in issue," adding, however, that one of those instance "resulted from plaintiff's own acts."^{7/}

Plaintiff's Rule 59(e) motion to vacate was denied, and this appeal followed. ^{8/}

^{7/} The reference is to the government's claim that, in the Manhattan incident, the plaintiff represented to the postal clerk that the message on his postal card violated the postal regulations, Defendant's Responses to Plaintiff's Interrogatories Dated December 22, 1976. The plaintiff asserts that he only asked the clerk if his card violated Sec. 123.44f of the Postal Service Manual (A. 28).

^{8/} At the encouragement of this Court's Staff Counsel, plaintiff's counsel, by letter dated January 10, 1978, advised the government that the plaintiff would consider giving up this appeal if several conditions were met, including revision of the various Postal Service Manuals to delete all reference to enforcement of 18 U.S.C. Sec. 1718; providing plaintiff with a letter from the Postmaster General which he could display to postal clerks, assuring him that his mail would not be interfered with based on any printed matter contained in such mail matter; and agreeing that, if there was any future interference with any of plaintiff's mail because of its contents, the United States would abandon the defense of mootness in future civil litigation challenging the constitutionality of Sec. 1718. Counsel was advised that the terms of settlement outlined above were rejected. Counsel then inquired, by letter of January 27, 1978, whether the United States would accept any of the proposed terms of settlement. Counsel was told, by letter of February 10, 1978, that there was "no basis for settlement short of your client voluntarily withdrawing the appeal."

ARGUMENT

I. THE CASE IS JUSTICIABLE

The issue on appeal in the present posture of this case is whether the district court's dismissal of the complaint on the ground that it presented no justiciable issue, was improper. If it was, the case must be remanded. The question of the constitutionality of 18 U.S.C. Sec. 1718 is not, of course, now before this Court.^{2/}

Neither the order of the court below nor the government brief below is very helpful in identifying the basis for the district court's dismissal. All that the order says is that the "Motion to dismiss this action for lack of a justiciable case or controversy is granted." The government's brief below, though it uses the term "justiciable case or controversy" several times, never really says whether it means standing, ripeness, mootness, or anything else. The closed it comes in its analysis of the case, is its statement (p. 10), that "This action fails to raise a substantial constitutional question for the simple reason that there is no justiciable case or controversy here. See Cherry v. Postmaster General, 332 F.Supp. 785 (S.D. 1971)(sic) and

^{2/} The facial overbreadth of the statute is established by the fact that it has twice been held unconstitutional on that ground. Tollett v. United States, 485 F.2d 1087 (8th Cir. 1973); United States v. Handler, 383 F. Supp. 1267 (D. Md. 1974). See also Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

Long v. District of Columbia, 469 F.2d 927, 931 (D.C. Cir. 1972)." Reference to Cherry I suggests that the government meant to imply that the case was moot. However, a few pages later (p. 157) the memorandum says, "Whether viewed from the standpoint of lack of standing or from the lack of irreparable injury, it is clear that there is no basis here for equitable relief inasmuch as this action does not involve the exercise of a bona fide first amendment right." Except for one earlier use of the word "standing," though not in the context of a technical discussion of justiciability (p. 12), the concept "standing" is not mentioned again. 10/

In the memorandum's next paragraph, it is said that "Even if a bona fide first amendment right is involved here, plaintiff has failed to show that there is a substantial risk that future violations will occur," which implies again that the government thinks this may be a mootness case, though this

10/ It is, of course, startling that the government charges that the plaintiff is not exercising "a bona fide first amendment right." It is not for the government ever to make such an accusation. It is even more objectionable for the government to assert in the next sentence that plaintiff "has no sincere interest in the message on the cards." If either of those assertions were admissible grounds for denying plaintiff adjudication of his legal rights, the First Amendment would be meaningless.

particular language might also be taken to mean that the case is unripe. The memorandum then immediately goes off in another direction by declaring that "In view of the fact that there are over 30,000 postal facilities and hundreds of thousands of postal employees, the mere occurrence as alleged by plaintiff of one or several isolated instances of illegal conduct hardly entitles him to injunctive relief," though the memorandum neglects to say why. The fact is that one or several instances of illegal conduct is precisely the basis of plaintiff's complaint, and is an adequate basis for finding that he has standing to bring this suit.

Though the concept of justiciability is among the most difficult aspects of constitutional law, the facts of this case do not require a long exegesis on the subject, for on the undisputed facts alone, it is plainly justiciable in every sense of the word. If we concentrate on mootness, as we do, it is because Judge Gurfein's opinion in Cherry I, a close relative of the case at bar, is the only available source of relevant analysis that bears upon the issue before the Court.

Standing

The doctrine of standing has been defined in such a variety of ways, many of them elusive, it has been said that "the application of the law of standing often defies analysis..." Dorsen, Bender & Neuborne, 1 Political and Civil Rights in

the United States (4th Ed. 1976), p. 1474. In their attempt to overcome that difficulty, the authors offer a definition applicable to constitutional litigation: "a putative plaintiff must demonstrate a personal stake in the outcome of the litigation sufficient to assure the concrete adverseness between the parties necessary for the proper presentation and development of the issues"; and "a putative plaintiff must demonstrate that he or she is arguably within the zone of interests protected by the ...constitutional provision sought to be invoked." In addition, the putative plaintiff must be able to show "injury in fact." Id. at 1474-75.

Under that test, or tests that are even more stringent, see Richardson v. United States, 418 U.S. 166 (1974); Warth v. Seldin, 422 U.S. 490 (1975), plaintiff's standing cannot reasonably be challenged. He has asserted his interest in challenging aspects of homosexuality on a political, religious, and sociological basis; he has from time to time expressed those views in writing and sought to circulate them to the public through the mails; he has asserted that those activities are protected by the First Amendment; and the Postal Service has violated his right to circulate his information freely by delaying delivery, See Lamont v. Postmaster General, 381 U.S. 301 (1965), and in some cases refusing to accept his post cards for delivery at all. He has surely, therefore, suffered concrete harm of constitutional dimension which

imparts to him the requisite standing to sue.

Ripeness

Ripeness is closely connected to mootness, and it is not always easy to separate the two doctrines. It is generally accepted that the notion of ripeness relates to whether an action is premature. See Wright, Miller and Cooper, Federal Practise and Procedure: Jurisdiction, Sec. 3532. Prematurity, of course, is not the issue in this case, for it must be conceded that damage has been done to the plaintiff's First Amendment interests, even in the face of the government's representation that the plaintiff's post cards are mailable and that there would be no recurrence of delay or refusal to accept for mailing.

Mootness

Since plaintiff has standing, and his claim is ripe for adjudication, the only remaining component of justiciability - the basis on which his complaint was dismissed - is mootness. ^{11/} But his complaint is not moot. The damage has been done to his First Amendment rights; the government's

^{11/} The political question doctrine is sometimes viewed as an aspect of justiciability. To the extent that that doctrine still survives, see Baker v. Carr, 369 U.S. 186 (1962), it has no arguable application here.

assurance that the damage will not recur has been disproven; the plaintiff asserts that he intends to continue to deposit material in the mails which will arguably violate Sec. 1718, including post cards such as those whose delivery has been interfered with already, and others; and Judge Gurfein's prediction in Cherry I that "the initial, admitted and temporary mistake of a low ranking Post Office official (is) a mistake which is not likely to recur" - which was the core of his holding the predecessor case moot - has also been disproven by the passage of time. Drawing on W. T. Grant v. United States, 345 U.S. 629 (1954), Judge Gurfein relied on the principle that "voluntary cessation of allegedly illegal conduct" may moot a case "if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" 332 F.Supp. at 789. That expectation was defeated in this case, and it therefore is not moot. See also Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Richardson v. Ramirez, 418 U.S. 24, 34-40 (1974).

The history of this case identifies it as one of that class where mootness claims fail because the challenged activity is capable of repetition, yet it evades review, a doctrine applied by the Supreme Court in a variety of different situations.

Carroll v. Commissioners, 393 U.S. 175 (1968), is a case conceptually quite like the one at bar. In that case, county officials secured an ex parte temporary restraining order forbidding petitioners, a white supremacist organization from holding public rallies for they would provoke violence. The temporary restraining order was to expire 10 days from the day it was issued. Within that period a hearing was held and an injunction was issued forbidding the petitioners from holding public rallies for 10 months. On appeal, the Maryland Court of Appeals affirmed the 10 day order and reversed the 10 months order. In the Supreme Court, the state officials argued that the case was moot since the 10 day order had expired almost two years earlier. The Court, finding that the petitioners have sought to continue their activities, held that the case was not moot: "The underlying question persists and is agitated by the continuing activities and program of petitioners...." The Court relied on the principle first enunciated in Southern Pacific Terminal Co. v. IC, 219 U.S. 498 (1911), that consideration of an issue "ought not be...defeated by short term orders capable of repetition, yet evading review...." (393 U.S. at 178-179).

In Moore v. Ogilvie, 394 U.S. 814 (1969) the question was the constitutionality of restrictive Illinois statutes relating to nomination for public office. The case reached the Supreme Court after election day and the defendants

argued that it was therefore moot. The Court rejected that argument on the ground that the issue raised a "continuing controversy" which was "capable of repetition yet evading review" (Id. at 816). See also Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (satisfaction of voter residency requirement does not moot challenge).

Lastly, the Court held in Roe v. Wade, 410 U.S. 113, 125 (1972), that a challenge to abortion statutes was not mooted by the ninth month gestation period. "Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be 'capable of repetition, yet evading review.'"

In each of those cases, the evasiveness of review was a function of the intrinsic temporal limitations of the subject matter - pregnancy, elections, restraining orders. That the nature of the subject matter in the case at bar is not of that precise character, makes no difference to the application of the principle. Here, review is being equally evaded by the government's repeated assertions that the plaintiff may mail his cards, while at the same time other government officials persist in intruding themselves between the plaintiff and the intended recipients of his printed messages.

Two other factual elements need to be emphasized.

Post office employees have specific instructions concerning the enforcement of 18 U.S.C. Sec. 1718. Section 12 of the Postal Service's Confidential Field Manual ^{12/} contains those instructions. They are significant in several respects. First, they encourage employees to notify local police officials about "scurrilous and defamatory/objectionable mailings" which may not violate federal law. Second, they make it clear that Sec. 1718 is a "viable statute" which should still be enforced even though it has been declared unconstitutional by the Eighth Circuit in Tollett v. United States, 485 F.2d 1087 (1973), and in United States v. Handler, 383 F.Supp. 1267 (D. Md. 1974). And Sec. 22.1 of the Confidential Management Manual demonstrates that investigation is encouraged of "scurrilous and defamatory/objectionable mailings," even if only after "a discerning evaluation" of the complaint (A. 37).

Second, in the court below, the government dismissed the significance of the recurrent interference with plaintiff's post cards by attributing it to "unauthorized acts of low ranking postal employees" (Defendant's Memorandum of Law, p. 16). Plaintiff is puzzled as to why the violation

^{12/} The excerpt from the Confidential Field Manual was filed by the government in response to plaintiff's June 21, 1977 Request for production of Documents. It is in the Appendix at A 36.

of his constitutional rights is less serious when committed by low ranking rather than high ranking public officers. In fact, most constitutional violations are committed by low ranking officials with whom the general public has regular contact. The Constitution is not concerned only with activities in the Oval office or at Cabinet level. What the cop on the beat or the postal employee in the local post office does, is equally subject to the limitations of the Bill of Rights. Thus, when all postal employees are advised by their governing manuals that Sec. 1718 is "viable" and to be enforced against scurrilous, defamatory, objectionable, and libelous material, then we should not be surprised either that interference with plaintiff's post cards has occurred and recurred in the past, and will surely recur in the future. But the government cannot be allowed to evade judicial review by coming to court on each occurrence, express its regret, confess that the interference is unauthorized, promise it won't happen again - though it does - and thus prevent judicial review of the statute which is the concrete source of interference with the plaintiff's right to employ the mails freely in order to circulate his political, religious and sociological views.

To repeat: plaintiff's First Amendment interests have already been injured; the injury has recurred in face of contrary protestations by the government; the plaintiff

intends to continue his post card campaign both with the same and different material as is involved here; and Judge Gurfein's prediction that there will be no recurrence has been disappointed. In light of all that, the court must conclude that this case is not moot. As Wright and Miller state, "...defendants should not be enabled to defeat public law enforcement by a deliberate policy of temporary acquiescence. The test of mootness is whether the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." Id. at Sec. 3533, p. 282. The defendant here has failed that test. ^{13/}

^{13/} We must suggest to the Court that there is a whiff of guile in the government's defense. We are drawn to that conclusion by the ambiguities in the various affidavits concerning the Puerto Rican mailings, and more specifically by one significant aspect of the events relating to the admitted mishandling of one of plaintiff's post cards in Brooklyn in 1974. In a letter dated December 11, 1974, the Brooklyn Postmaster apologized to the plaintiff and assured him that "suitable instructions had been issued to postal employees concerned, to prevent a recurrence" (A. 19). In answers to plaintiff's interrogatories, however, the defendant concedes that there is no evidence that such instructions were ever issued, and quotes a supervisory employee as declaring "that he does not recall any such instructions." (A. 39).

II. THE COURT BELOW USED IMPROPER
PROCEDURE IN ARRIVING AT THE
FACTUAL CONCLUSION THAT PLAIN-
TIFF'S CASE WAS MOOT

The district judge disposed of this case on the basis of the defendant's motion to dismiss under "Rule 12(b)". Although neither the district court nor the defendant ever specifically identified the subsection on which the motion was based, the motion was necessarily brought under 12(b)(6), because none of the other subsections would allow a conclusion that a case is non-justiciable, since none of them by definition would encompass such a ground.

It seems to us that there are two ways to analyze the action taken by the district court. One, the motion to dismiss can be taken as declaring that a defense of mootness or any of the other concepts included within the term "justiciability" is the equivalent of a claim under Rule 12(b)(6) that the complaint does not state a claim upon which relief can be granted. See Tatum v. Laird, 408 U.S. 1 (1972). Second, the motion to dismiss can be seen as raising "a defense in bar" under 12(b)(6), as was held by the D.C. Circuit in Blackhawk Heating v. Driver, 433 F.2d 1137 (1970).

In either case, a 12(b)(6) motion must, of course, be based in the assumption that the allegations in the complaint are true. Conley v. Gibson, 355 U.S. 41 (1957). If that were the standard used by the district court here, he would have been plainly in error in concluding that the case was moot, since the complaint alleges repeated instances

of interference with plaintiff's post cards based on their content.

But since the district court found the case moot, he must have looked elsewhere than to the complaint for the facts to support his conclusion; he must, in fact, have looked to the affidavits submitted by the defendant in support of his motion to dismiss under Rule 12(b). Consequently, the conclusion is inescapable that, in considering the affidavits, the district court triggered the provision contained in the last sentence of Rule 12(b) which requires that, if matters outside the pleadings "are presented to and not excluded by the court" on a 12(b)(6) motion, the motion shall be converted to one for summary judgement" and disposed of as provided in Rule 56..." The court in Blackhawk Heating, supra, at 1144-45, felt obliged to convert in a situation where the preliminary issue was one of standing, where the district court had considered material outside the pleadings. Since mootness is the same kind of preliminary issue as standing, the motion to dismiss here had to be converted to a summary judgement motion. If it were, the district court could not properly have concluded that the case was moot without a hearing because the parties' opposing affidavits on the question of mootness raised genuine issues of material fact that could not be disposed of summarily.

However, the requirement that the defendant's motion to dismiss be converted to a motion for summary judgment, raises another procedural problem in the context of this case. Since this is a case for a three-judge court, the conversion to summary judgment bars a determination by a single judge. Before the 1976 amendments to 28 U.S.C. Sec. 2284, subsection (5) expressly prohibited a single judge from entering a "summary or final judgment." As amended, Sec. 2284(b)(3) now prohibits a single judge from entering a "judgement on the merits." There is no suggestion that the change of language changes the earlier practice, and we assume that a single judge today is no more empowered from entering a motion for summary judgment today than he was before the 1976 amendments.

CONCLUSION

For the reasons set forth above, the decision of the court below finding the case moot, should be reversed as clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure, and the case remanded with instruction to convene a statutory three-judge court to hear and determine plaintiff's complaint.

Respectfully submitted,

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March 14, 1978

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6211

FRED CHERRY,

Plaintiff-Appellant

v.

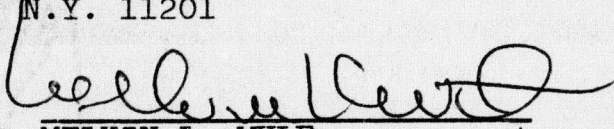
THE POSTMASTER GENERAL OF THE UNITED STATES,

Defendant-Appellee

CERTIFICATE OF SERVICE

I, Melvin L. Wulf, attorney for Plaintiff,
hereby certify that I have this 14th day of March,
1978, served upon defendant 2 copies of the attached
Appellant's Brief and 1 copy of the attached Appendix,
by mailing copies thereof, postage prepaid, to counsel
for Defendant at the following address:

Mr. David Trager
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